SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 49

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION, AND
HAZELTINE CORPORATION, A CORPORATION,
Respondents.

REPLY BRIEF OF PETITIONER, ZENITH RADIO CORPORATION.

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INDEX.

	PAGE
I. The Real Question Presented	1-3
II. There Is No Defense to the Injunction Issue	3-6
III. The Fact of Damage Was Not Denied	6-9
IV. Answer to Other Issues	8
Conclusion	9

TABLE OF CASES.

Becken Co. v. Gemex Corp., 280 F. 2d 508 (C. A. 7, 1960) 9

Bigelow v. R K O Radio Pictures Inc., et al., 327 U. S. 251 (1946) 3

Continental Ore Co. v. Union Carbide Corp., 370 U. S. 690 (1962) 3

Gary Theatre Co. v. Columbia Pictures Corp., 120 F. 2d 891, 894 3

Graver v. Lind, 336 U. S. 271 (dist.) 4

Grepke v. General Electric Co., 280 F. 2d 508, 513 (C. A. 7 1960) 9

Magnum v. Coty, 262 U. S. 159 (dist.) 4

William H. Rankin Co. v. Associated Bill Posters, 42 F. 2d 152 (C. A. 2 1930) 9

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I.

THE REAL QUESTION PRESENTED.

The gist of the respondent's brief in opposition to the petition is that no question of law worthy of this Court's consideration is presented for decision here because the Court of Appeals for the Seventh Circuit has made its own determination of the facts in direct contradiction to those of the trial court. This contention ignores the fact that none of the facts shown by this record are in dispute, and that the Court of Appeals has held as a matter of law (a) that there can be no threat to petitioner's export business posed by well implemented patent pools in three foreign countries and (b) that as a matter of law no fact of damage can be shown by the existence of pools controlling the licensing of all important patents in color television which by a conspiracy of petitioner's competitors will not be licensed for the sale of imported television sets.

These rulings of the Court of Appeals raise a question of law which if not reversed by this Court will permit foreign patent pools complete immunity under the anti-trust laws to destroy the foreign trade of companies such as Zenith, and this at a time when adverse foreign trade balances threaten the integrity of the American dollar and the entire financial machinery for carrying on trade by American companies in foreign markets.

We reiterate that as stated in the petition, this Court now has before it for decision the question of whether or not the Court of Appeals decision, which encourages the activity of foreign pools, and Hazeltine's participation therein, can stand without putting judicial sanction on such illegal activity. To characterize such an issue as one merely raising a routine issue of fact, as respondent's brief attempts, discloses that the entire reply is merely an attempt to bury the controlling issues under a false claim that a large record contains evidence in support of respondents' contentions when as a matter of fact the only defense respondent ever asserted at the trial was abandoned in the Court of Appeals (R. 1050-52, 1054, 1628-45, 1735-40, Def. Ex's 163-8, 173; R. 3308-26, 3379-81, Z. R. 605, Trial Court Finding XXXII). The so-called large record contains only evidence in support of the trial court's findings. See citations to the findings set forth in Appendix B to the Petition.

A Senate Subcommittee had no difficulty understanding the issue when Senator Russell B. Long stated "what is especially intolerable is that United States Government funds paid for 90% of the research which enabled this company (Hazeltine) to accumulate its patents. In essence, then, public funds have been used to prevent Americans from exporting their goods." (Committee on the Judiciary, United States Senate Hearings, Jan. 1, 2, and 3, 1965, page 331.)

The decision of the Court of Appeals for the Seventh Circuit will be interpreted throughout the whole world as meaning only one thing, and that is that the Federal Antitrust laws afford no remedy to a private company to redress the illegal activities of foreign patent pools, even though such pools prevent the export of American goods and even though they are joined in by American competitors.

II.

THERE IS NO DEFENSE TO THE INJUNCTION ISSUE.

The Court of Appeals decision did not change findings of fact entered by the District Court, and described in the Court of Appeals decision as follows:

> "The District Court concluded that the alleged conspiracies had as their express purpose prevention of importation of TV apparatus made in the United States, that HRI, by participating in the conspiracies had violated the Sherman Act * * *".

The witness, Dodds, counsel for Hazeltine and its former president, and one who had managed its patent license activities for many years (R. 41), testified that his company had participated in the pools for many years, and intended "to continue to stay in the pool" (R. 1775). The Court of Appeals holds that pools proven by documentary evidence designed to stop Zenith's export business could constitute no threat to Zenith's business under 15 U. S. C. Section 26. It is obvious that where admitted and uncontradicted facts are presented by the record, the Court of Appeals decision that such facts do not justify an injunction, constitutes a question of law under the antitrust laws. See *Bigelow* v. *RKO Pictures, Inc., et al.*, 327 U. S. 251 (1946), and *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690 (1962). As stated in *Gary Theatre Co.* v.

Columbia Pictures Corp., 120 F. 2d 891, 894: "whether a conspiracy exists is a question of ultimate fact but whether the facts bring defendants within the prohibition of the statute, is a question of law." Hazeltine's reliance on *Magnum* v. *Coty*, 262 U. S. 159, and *Graver* v. *Lind*, 336 U. S. 271, 275 is misplaced. Those cases involve "concurrent findings of fact by two courts below". This case involves a reversal of a District Court's findings which are based on admitted and uncontradicted testimony.

The only answer Hazeltine makes is that the record shows Zenith had patent protection by virtue of an earlier settlement with three members of the pool. Hazeltine neglects to point out that that settlement only granted licenses on radio patents and black and white TV sets that had been issued prior to 1957. Further it is not pointed out that the settlement did not in any manner affect color TV and carried no assignments of color patents (Pl. Ex. 4, R. 2131, 2133). Further Hazeltine claims that its color patents which are now in the Canadian pool, control the color television market (R. 2194-95, 2373).

The contention also ignores the undenied testimony that Brian McConnell threatened Zenith with the assertion of patents issued after the prior settlement (R. 1332), and not included therein and that immediately after such threat the instant suit was brought on a Hazeltine patent included in the pool (R. 2195, 1332). Hazeltine now says contrary to the record that the trial court did not find that the instant suit was started pursuant to the conspiracy, but the trial court found all the issues in favor of the petitioner (R. 128), and one of the specific issues in the case was whether the suit was brought pursuant to the conspiracy as expressly alleged in the counterclaim (R. 51-2).

That the pool constituted a threat to Zenith's business in Canada was shown by Hazeltine's own evidence (Pl. Ex. 50A; R. 2162). Thus, a Canadian Commission held:

"The portfolio in respect of which CRPL had the

right to claim licenses consisted of 5,000 patents and in the absence of a license from CRPL it is doubtful if anyone could sell in Canada a radio or TV receiver."

Even though this was Hazeltine's own evidence, it is now claimed to be worthless because Zenith did in fact export radio and TV sets in the face of the threat inherent in the activity of the pool. However, Zenith attempted to reconstitute its Canadian television business relying on the mistaken belief that they had settled their difficulties with the Canadian pool (R. 1372-1378) and in reliance on protection they believed was afforded them by the Federal Antitrust laws. In the damage computation Hazeltine was given credit for all profit made on the Canadian business (R. 3905, 1436).

The Court of Appeals decision now withdraws any such protection which will result in the destruction of Zenith's color television business in Canada, which under the protection of the District Court's injunction grew to $20,000,000 annually. If the instant decision is permitted to stand, it must be apparent to this Court that Zenith's business is subject to patent suits on the patents held by the pool whose members constitute its entire competition in the electronics industry in Canada (Def. Ex. 117, R. 2879).

It is now claimed that the pools have expired, but the documents in evidence show the claim to be false (R. 2914), and the contrary was admitted by Dodds, Hazeltine's counsel, at the trial (R. 1099, 1100). The record shows that by agreement dated March 19, 1963 the Canadian pool and conspiracy was extended by formal agreement to December 31, 1963 (R. 2914). Similarly in England the pool agreement was extended to June 30, 1964, a date after the trial of this case (R. 2515). In Australia the documents show the continuance of the pool throughout the trial (R. 3708, 3712, 3743-3746). The proofs do not show what the situation is beyond those dates because the Court ordered a cut-off date on proofs as of May 22, 1963 (Z. R. 128).

III.

THE FACT OF DAMAGE WAS NOT DENIED.

While an effort is made by the respondents to make it appear that this Court must engage in a re-evaluation of contested facts, the record discloses that no evidence was offered or received in defense except the claim that the Canadian Patent Act justified the pool. The respondent lost this issue in the trial Court (Finding XXXII, R. 1628-45, 1735-40). The issue was abandoned in the Court of Appeals.

All of the District Court's findings were on documentary evidence, or on parole evidence not denied. For example, the testimony of Wright, Zenith's president, and Kaplan, Zenith's treasurer, that Zenith's business was injured by the pools was not denied by any testimony. No witnesses from the pool were called by Hazeltine to deny this testimony, although the members of the pool consisted of all of the leading electronics companies in the world (R. 2161), and had an intimate knowledge of whether or not such testimony was true.

The Court of Appeals holds as a matter of law in the face of undisputed documentary evidence that pools designed to protect foreign markets from competition can cause no injury whatever to a corporation equipped to compete in such foreign market. Hazeltine's own witness, Henderson, admitted "the fact of damage" to Zenith in Canada. He testified as follows (R. 1627):

"Q. So this report then says that in the face of 5,000 patents it is doubtful if anyone could sell in Canada a radio or TV set, is that right?

A. That is what it says.

Q. And that would include the Zenith Radio Company wouldn't it?

A. It would include anyone as at that time who sought to sell in Canada radio receiving sets, that is right."

The respondent says the Court of Appeals decision is supported in England, because Zenith did not demand a pool license. However, such a demand if granted would have put Zenith in the conspiracy because the licensees had to agree to boycott sets not manufactured in England, as a condition to getting a license. Thus, the pool license provided that the licensee agrees "not without the previous written consent of the grantors to sell within the said territory any TV receiver which has not been manufactured in the territory for which this license is granted." (Def. Ex. 69, R. 2615.)

The record shows by undisputed documentary evidence produced from Hazeltine's files that the pools in Australia had existed over thirty-five years, and were in existence at the time of the trial, and that Hazeltine participated therein during all this time (Def. Ex. 197, R. 3727). The written evidence not denied shows that pool licenses have always precluded the licensing of any imports of American sets (Def. Ex. 197, R. 3727). The pool never in its history has granted a license to sell American sets not manufactured in Australia (Def. Ex. 197, R. 3727). The pool never in its history has granted a license to import American sets into Australia (Def. Ex. 188-195, R. 3625-3719).

The attempt to use offers of proof as evidence in this case set out at pp. 23, 15 of respondent's brief, discloses the lack of evidence in denial of the fact of damage. As we have already stated the case stands in the posture of a demurrer to the evidence raising an issue of tremendous public importance, namely whether the Federal Antitrust laws afford any redress to an American manufacturer equipped to compete in foreign markets, but barred from

so doing by illegal patent pools which by conspiracy refuse to license competitive manufacturers to export sets into such foreign countries.

IV.

ANSWER TO OTHER ISSUES.

The issues of patent misuse and the dismissal of the parent company Hazeltine Corporation are discussed in the Petition and need not be reargued here except insofar as it is now claimed that the patent misuse issue is moot because the patent was declared invalid. The Court of Appeals answered this contention when it said that the issue was not moot because it was made the basis for a treble damage judgment. Further, four other black and white patents were asserted (R. 1357) and nine color television patents (R. 1341, 1345, 2281) under the conditions asserted by the petitioner to constitute misuse, and further still the injunction entered by the trial court which protected Zenith from misuse of respondent's patents under the antitrust laws was modified by striking out such protection (Page 85 of the Petition).

The issue of whether or not the Court of Appeals was free to disregard the provisions of Rule 52(a) of the Federal Rules of Civil Procedure is claimed by respondent to be inapplicable because the findings of fact were made by a judge and not a jury. The trial court in the instant case is one of the most experienced trial judges on the Federal Bench, and he found on uncontradicted evidence all the issues in favor of petitioner. The respondent says the *Bigelow* case has no application because it was a jury case. Certainly a trial court has the right to draw inferences from the evidence just as does a jury. Particularly is that true where as here the evidence is not denied, or disputed, and where just as in *Bigelow* the only evidence available to Petitioner on the issue of damages was the comparison

of two markets, one open and the other restrained by conspiracies, and the testimony of the petitioner's officers that Zenith had been damaged. *Cf. William H. Rankin Co.* v. *Associated Bill Posters* (C. A. 2, 1930), 42 F. 2d 152, 155-6; *Grepke* v. *General Electric Co.* (C. A. 7, 1960), 280 F. 2d 508, 513; *A. C. Becken Co.* v. *Gemex Corp.* (C. A. 7, 1959), 272 F. 2d 1, 5.

CONCLUSION.

For the reasons given here and in the Petition, we respectfully urge that the large public interest involved in the protection of American foreign trade by Federal Antitrust laws be recognized by the granting of this Court's Writ of Certiorari.

Respectfully submitted,

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